

STEPHEN P. BERZON (#46540)  
sberzon@altshulerberzon.com  
LINDA LYE (#215584)  
llye@altshulerberzon.com  
CLAIRE P. PRESTEL (#235649)  
cprestel@altshulerberzon.com  
Altshuler Berzon LLP  
177 Post Street, Suite 300  
San Francisco, CA 94108  
Telephone: (415) 421-7151  
Facsimile: (415) 362-8064

ELIZABETH GINSBURG  
(Admitted to Practice *Pro Hac Vice*)  
elizabeth.ginsburg@alpa.org  
Air Line Pilots Association, International  
1525 Massachusetts Ave., NW  
Washington, D.C. 20036  
Telephone: (202) 797-4081  
Facsimile: (202) 797-4014

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

SKYWEST PILOTS ALPA ORGANIZING )  
COMMITTEE, *et al.*, )  
Plaintiffs, )  
vs. )  
SKYWEST AIRLINES, INC., )  
Defendant. )

CASE No. C-07-2688 CRB

**PLAINTIFFS' OPPOSITION TO  
DEFENDANT'S MOTION RE:  
APPROPRIATE INJUNCTION  
BOND**

Date: August 2, 2007

Time: 9:30 am

Place: Courtroom 8, 19th Floor

Defendant SkyWest Airlines, Inc. (“SkyWest”) seeks a bond in the unjustified and unjustifiable amount of \$700,000, to cover its attorney’s fees and expenses thus far incurred in this Court in connection with the temporary restraining order and preliminary injunction, as well as its anticipated litigation expenses for the remainder of this case, including discovery and trial. If SkyWest is entitled to a bond at all, under the Norris-LaGuardia Act (“NLGA”) case law, that bond can cover at most only the projected reasonable attorney’s fees in connection with an appeal of the preliminary injunction. Yet SkyWest has chosen *not* to appeal the preliminary injunction.<sup>1</sup> The only purpose of the bond requirement is to indemnify a defendant against expenses its incurs in challenging and overturning the temporary injunction. Where, as here, SkyWest will not incur any expenses to appeal the preliminary injunction, imposition of any bond, let alone the exorbitant bond SkyWest seeks, would serve no purpose other than to inflict severe and potentially chilling financial costs on Plaintiffs in retaliation for their successful effort to obtain federal court protection of their free expression rights under the Railway Labor Act.

#### **I. The Norris-LaGuardia Act Does Not Apply To This Case**

Defendant invokes Section 7 of the NLGA. As a threshold matter, the NLGA – including Section 7 – is inapplicable to this case for all of the reasons previously set forth in Plaintiffs’ opposition to SkyWest’s motion to dissolve the TRO (Doc. 31).<sup>2</sup> If the court previously had doubt on this issue, SkyWest’s bond request should dispel any such doubt. Certainly, Congress never intended the NLGA – which was enacted to protect union free speech rights – to require workers seeking to protect free speech in an organizing campaign to post a mammoth bond.

---

<sup>1</sup>This Court issued the preliminary injunction on June 27, 2007. SkyWest was required to file a Notice of Appeal within 30 days of that date, or July 27, 2007. Fed. R. App. Pro. 4(a)(1)(A). As of the time of the filing of this brief, Plaintiffs have not received notice of any such appeal.

<sup>2</sup> See *Machinists v. TWA*, 654 F.Supp. 447, 456 (D.D.C. 1987) (Section 7 “inapplicable . . . where a union seeks to compel an employer to comply with the commands of the [RLA]”), *aff’d in part, rev’d in part on other grounds*, 839 F.2d 809 (D.C. Cir. 1988); see also *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 458 (1957) (holding procedural requirements “inapposite”); *Local 205 v. G.E.*, 233 F.2d 85, 92 (1st Cir. 1956); *Smith v. Bowers*, 337 F.Supp.2d 576, 585 (S.D.N.Y. 2004); see generally *Va. Ry. v. Sys. Fed.*, 300 U.S. 515, 562-63 (1937) (NLGA should not be applied to frustrate RLA’s purpose); *Bhd. of R.R. Tr. v. Chi. River R.R.*, 353 U.S. 30, 40 (1957) (same).

As a result, the posting of security for the preliminary injunction in this case is governed by Federal Rule of Civil Procedure 65(c), and, as Defendant concedes, Rule 65(c)'s bond requirement may be waived. In this case, waiver of a bond is appropriate for each of the following independent reasons: First, Plaintiffs have a strong likelihood of success on the merits. *Scherr v. Volpe*, 466 F.2d 1027, 1035 (7<sup>th</sup> Cir. 1972). Second, there is no realistic likelihood of harm to Defendant from enjoining its conduct. *Jorgensen v. Cassidy*, 320 F.3d 906, 919 (9<sup>th</sup> Cir. 1996). And third, the "equities of potential hardships to the parties" weighs in favor of Plaintiffs. *Temple Univ. v. White*, 941 F.2d 201, 220 (3d Cir. 1991).

## **II. Even Pursuant To Section 7 Of The NLGA, Defendant Is Entitled At Most To A Bond Limited To Attorney's Fees Incurred In Any Appeal Of The Preliminary Injunction**

Even assuming the NLGA applies to this case, however, Section 7 in no way supports Defendant's request for a \$700,000 bond. Section 7's bond requirement protects a party from the "improvident or erroneous" issuance of an injunction. 29 U.S.C. §107. Courts construing Section 7 have therefore limited the amount of a bond to cover only attorney's fees incurred in connection with an appeal of the preliminary injunction at issue. In this case, SkyWest has chosen not to appeal the preliminary injunction. As a result, no bond should be posted at all. A bond would not serve its intended purpose of indemnifying SkyWest from those expenses necessary to overturn the preliminary injunction – because SkyWest will have no such expenses.

Section 7 provides for a bond "to recompense those enjoined for any loss, expense, or damage caused by *the improvident or erroneous issuance* of such order or injunction." 29 U.S.C. §107 (emphasis added). In *Newspaper & Periodical Drivers' & Helpers' Union, Local 921 v. San Francisco Newspaper Agency*, 89 F.3d 629, 633-34 (9<sup>th</sup> Cir. 1996), the Ninth Circuit made clear that the focus of the analysis in the context of preliminary injunction bonds is whether the preliminary injunction was wrongfully issued. In this regard, it is critical to distinguish between the issue of whether the preliminary injunction was wrongfully issued, and whether the employer prevails on the ultimate merits of the underlying dispute. In *San Francisco Newspaper Agency*, a union obtained a preliminary injunction to protect the status quo pending arbitration of a dispute between the parties, but subsequently lost the arbitration. The employer sought to execute the preliminary injunction bond based on its success on the underlying dispute, but the district court denied the motion. The Ninth Circuit

1 affirmed because the purpose of the preliminary injunction bond is to guard against “possible wrongful  
2 issuance of the preliminary injunction,” and resolution of the merits of the underlying dispute in the  
3 employer’s favor did not establish that the preliminary injunction was wrongfully issued.<sup>3</sup> *Id.* at 633.

4 Applying the same reasoning of the Ninth Circuit in *San Francisco Newspaper Agency*, courts  
5 setting preliminary injunction bonds pursuant to Section 7 have limited the bond to cover only an  
6 employer’s attorney’s fees in appealing the preliminary injunction. In *Chauffeurs, Teamsters and*  
7 *Helpers Local Union No. 414 v. Food Marketing Corp.*, 1986 WL 15724 (N.D. Ind. Oct. 3, 1986)  
8 (“*FMC*”), a union sought to enjoin an employer’s effort to terminate health and welfare coverage for  
9 its employees pending the outcome of an arbitration concerning the permissibility under the parties’  
10 collective bargaining agreement of the employer’s action. The court issued the injunction “to prevent  
11 the arbitration from becoming a futile endeavor.” *Id.* at \*6. The court *rejected* the employer’s argument  
12 that the bond should cover its expenses in the event that it prevailed on the ultimate merits of the  
13 underlying dispute in arbitration. *Id.* at \*8-9. Section 7, the court explained, is “specifically designed  
14 to protect a party against an improvident or erroneous issuance of an injunction. . . . In other words, it  
15 protects a party against a court’s mistake.” *Id.* at \*9. The court thus limited the bond to “attorney’s  
16 fees on appeal.” *Id.* at \*9. The court therefore set the bond at \$5,000. *Id.* at \*10; *see also United Steel*  
17 *Workers of America, AFL-CIO-CLC v. Cooper-Standard Auto. of Bowling Green*, 2004 WL 2599132,  
18 \*8 (N.D. Ind. Nov. 2, 2004) (holding that pursuant to Section 7 of NLGA, “Defendants’ potential  
19 expense in determining whether this Court has erred in deciding . . . that the conditions for the issuance  
20 of an injunction exist[] is limited to the cost of pursuing further legal proceedings”).

21 In this case, SkyWest seeks to recover its attorney’s fees previously incurred in the district court  
22 in litigating the temporary restraining order and the preliminary injunction (which would have been  
23

---

24 <sup>3</sup>Although the bond in that case was issued pursuant to Fed. R. Civ. P. 65(c), the Ninth  
25 Circuit has held that “[t]he pertinent language of section 7(e) of the Norris LaGuardia Act is not  
26 significantly different from that of Rule 65(c)” with respect to the types of expenses to be covered  
27 by a bond. *Amalgamated Transit Union v. Greyhound Lines, Inc.*, 529 F.2d 1073, 1079 (9th Cir.  
28 1976), *vacated on other grounds*, 429 U.S. 807 (1976); *see also United Steel Workers*, 2004 WL  
2599132 \*8 (construing Rule 65(c) and Section 7 as setting forth “similar” standards); *FMC*, 1986  
WL 15724 \*8 (“[t]he operative passages in [Rule 65(c) and Section 7] are not significantly  
different”).

1 incurred whether or not the preliminary injunction issued), as well as all further proceedings in this  
 2 court concerning the underlying merits of this case, including discovery and trial. Def’s Brf. Re: Bond  
 3 at 3:22-24 (Doc. No. 166); Emerson Decl. at ¶¶3-5 (Doc. No. 167). Again, SkyWest would still have  
 4 to incur expenses connected with merits litigation, whether or not the court had issued the preliminary  
 5 injunction. Thus, the bond should instead be limited to SkyWest’s expenses for any “attorney’s fees  
 6 on appeal.” *FMC*, 1986 WL 15724 at \*9. However, SkyWest *has not sought to appeal the preliminary*  
 7 *injunction*. As a result, SkyWest will not incur any expenses in “establish[ing] the erroneous issuance  
 8 of the [preliminary] injunction.” *Id.* Where, as here, SkyWest has chosen not to challenge the  
 9 preliminary injunction, the union should not be forced to post a bond to cover expenses that SkyWest  
 10 will not incur.

11 Indeed, the exorbitant bond sought by SkyWest would only serve to inflict potentially chilling  
 12 financial harm on Plaintiffs’ for seeking to protect their free speech rights under the Railway Labor Act.  
 13 As the Sixth Circuit stated in reversing a district court’s requirement that a union post a bond in the  
 14 “exorbitant” amount of \$750,000, “[i]n considering a motion to require a security bond, . . . the court  
 15 should be sensitive not only to the enjoined party’s need for security against financial loss, but also the  
 16 moving party’s right to relief.” *Div. No. 1, Detroit, Bhd. of Locomotive Engrs. v. Consolidated Rail*  
 17 *Corp.*, 844 F.2d 1218, 1225, 1226-27 (6th Cir. 1988) (Railway Labor Act injunction).<sup>4</sup>

18 SkyWest’s brief is directed at an entirely irrelevant issue – whether SkyWest’s ultimate recovery  
 19 would be limited to the amount of the bond. But its brief fails to discuss the issue currently before the  
 20 Court – the type of attorney’s fees that a bond on the preliminary injunction must cover.

21 SkyWest is not entitled to a bond for attorney’s fees incurred in the district court associated with  
 22 litigating the TRO and preliminary injunction. Section 7 provides for fees and expenses “caused by the  
 23 improvident or erroneous *issuance*” of a preliminary injunction, including attorney’s fees incurred in  
 24 “defen[ding] against the *order*.” 29 U.S.C. §107 (emphasis added). The language of Section 7  
 25 necessarily excludes SkyWest’s attorneys’ fees and expenses in the district court because such expenses  
 26 are “caused” by Plaintiffs’ preliminary injunction motion, *not* “the improvident or erroneous *issuance*”  
 27

---

28 <sup>4</sup>The bond in this case was issued pursuant to Rule 65(c). *But see supra* at note 3.

1 of such order or injunction.” Nor are they incurred in “defen[ding] against the *order*.” Rather, they  
2 were incurred in defending against the *motion* for a preliminary injunction, before any *order* ruling on  
3 that motion was issued. The only expenses SkyWest would have incurred in “defending against the  
4 order” are fees related to an appeal of the order granting the preliminary injunction. But SkyWest chose  
5 not to file such an appeal.

6 Second, the reasoning underlying the Ninth Circuit’s decision in *San Francisco Newspaper*  
7 *Agency* forecloses any argument that the preliminary injunction bond should cover litigation expenses  
8 pertaining to a *permanent* injunction, *i.e.*, the ultimate merits of this case, because the determinative  
9 question with respect to the preliminary injunction bond is whether the preliminary injunction was  
10 wrongfully issued. *See FMC*, 1986 WL 15724 \*8-9 (ruling on merits of underlying dispute by arbitrator  
11 “is not the measure” of “the potential damage faced by FMC in the event that the injunction has been  
12 improperly issued”). And the propriety of permanent – as distinct from preliminary – injunctive relief  
13 raises analytically distinct questions. *See Citizens for Clean Govt. v. City of San Diego*, 474 F.3d 647,  
14 650 (9th Cir. 2007) (noting different standards of review applicable to appeal of permanent as distinct  
15 from preliminary injunction). Indeed, a preliminary injunction expires of its own volition with the  
16 issuance of the final judgment, regardless whether a permanent injunction is entered.

17 Furthermore, SkyWest provides only the most skeletal evidentiary support for its \$700,000  
18 figure. It has submitted a conclusory declaration stating that it has incurred \$334,713 in attorney’s fees  
19 and costs in connection with the TRO and preliminary injunction, but has not provided any billing  
20 records to substantiate this substantial sum. Emerson Decl. at ¶3 (Doc. No. 167). Determinations as  
21 to the appropriate amount of a bond “should be made on the basis of specific evidence in the record.”  
22 *Div. No. 1*, 844 F.2d at 1227 (reversing district court’s order setting bond in amount of \$750,000 where  
23 “factual basis for” defendant’s projected losses was “at best tenuous”).

## 24 CONCLUSION

25 For the foregoing reasons, SkyWest’s motion to set the bond in the amount of \$700,000 should  
26 be denied. No bond should be required because SkyWest has chosen not to incur the only expenses that  
27 a Section 7 bond would cover.  
28

1 Dated: August 1, 2007

Respectfully submitted

2 STEPHEN P. BERZON

LINDA LYE

3 CLAIRE P. PRESTEL

Altshuler Berzon LLP

4 ELIZABETH GINSBURG

5 Air Line Pilots Association, International

6 by: \s\Stephen P. Berzon

7 Stephen P. Berzon

8 Attorneys for Plaintiffs